IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Smt. Sushila & ors. Versus State of Rajasthan & Anr.

S.B. Criminal Misc. Petition No. 994/2005
against the order dated 4-4-2005 passed
by the Additional Sessions Judge No.2, Sri
Ganganagar, in Criminal Revision No.1/2005.

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Date of Order: October 16, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. Vinod Bhadu, for the petitioners.
Mr. Ashok Upadhyaya, Public Prosecutor for the State.
None present for the non-petitioner No.2 though served.

BY THE COURT:
Reportable.

By this criminal miscellaneous petition under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code" hereinafter), the petitioners have challenged the order dated 4-4-2005 passed by the Additional Sessions Judge No.2, Sri Ganganagar (for short, "the Revisional Court" hereinafter) in Criminal Revision No. 1/2005, whereby the revision petition filed by the petitioners against the order dated 18-12-2003 passed by the Judicial Magistrate, Sri Ganganagar (for short, "the trial Court" hereinafter) was dismissed.

I have heard learned counsel for the petitioners and

the Public Prosecutor for the State. No one appears for the non-petitioner No.2 though served. Carefully gone through the orders passed by the trial Court as well as the Revisional Court.

The facts of the case, relevant and necessary for the decision of this criminal miscellaneous petition, are that a complaint under Section 138 of the Negotiable Instruments Act, 1881 (for short, "the Act" hereinafter) was filed by complainant Suresh Jain against non-petitioner No.2 Mukesh Kumar. During pendency of the complaint, complainant Suresh Jain died. The petitioners, who are legal representatives of deceased Suresh Jain, filed an application on 18-12-2003 before the trial Court for taking them on record as the legal representatives of deceased complainant Suresh Jain and permitting them the prosecution/continuing the proceeding initiated by the deceased complainant. The trial Court, vide order dated 18-12-2003, dismissed the application. Being aggrieved by the order of the trial Court, the petitioners filed a criminal revision, which has been dismissed by the Revisional Court vide impugned order dated 4-4-2005.

Section 302 of the Code provides that any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person, other than a police officer below the rank of inspector, but no person, other than the Advocate-General or Government-Advocate or a Public Prosecutor or

Assistant Public Prosecutor, shall be entitled to do so without such permission, provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted. Sub-section (2) of Section 302 of the Code provides that any person conducting the prosecution may do so personally or by a pleader.

The question whether on the death of the complainant/first informant, the legal heir of such deceased can be permitted prosecution/ continuance of proceedings, came to be considered by the Hon'ble Supreme Court in Ashwin Nanubhai Vyas Vs. State of Maharashtra, AIR 1967 SC 983, wherein the Hon'ble Apex Court, while considering the provision of Section 495 of the Code of Criminal Procedure, 1898 (for short, "the Old Code" hereinafter), which is corresponding to Section 302 of the New Code, held that upon the death of the complainant, under the provisions of Section 495 of the Old Code, mother of the complainant could be allowed to continue the prosecution.

In Jimmy Jahangir Madan Vs. Bolly Cariyappa Hindley (Dead) by LRs., (2004) 12 SCC 509, this issue again came up for consideration by the Hon'ble Supreme Court and the Apex Court held that the question as to whether the heirs of the complainant can be allowed to file an application under Section 302 of the Code to continue the prosecution is no longer res integra as the

same has been concluded by the Supreme Court in the case of Ashwin Nanubhai Vyas Vs. State of Maharashtra (supra), in which case the Court was dealing with the provision of Section 495 of the Old Code which is corresponding to Section 302 of the New Code. In that case it was laid down that upon the death of the complainant, under the provisions of Section 495 of the Old Code, the mother of the complainant can be allowed to continue the prosecution. It was further laid down that she could make application either by herself or through a pleader.

In the recent decision of the Hon'ble Supreme Court in Balasaheb K. Thackeray & Anr. Vs. Venkat alias Babru S/o Wamanrao, (2006) 5 SCC 530, reiterating the view taken by the Apex Court in Ashwin Nanubhai Vyas Vs. State of Maharashtra (supra) and Jimmy Jahangir Mada Vs. Bolly Cariyappa Hindley (Dead) by Lrs. (supra), the Hon'ble Apex Court held that permission to conduct the prosecution has to be obtained from the Magistrate inquiring into or trying a case. The Magistrate is empowered to permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than the Advocate General or the Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission. Considering the above being the position, if any permission is sought for by the legal heirs of the deceased complainant to

continue prosecution, the same shall be considered in its perspective by the court dealing with the matter.

The petitioners are the legal representatives of deceased complainant Suresh Jain being his mother, widow and sons. Keeping in view the provisions of Section 302 of the Code and the aforesaid decisions of the Hon'ble Supreme Court, in my view, the orders impugned passed by the trial Court and affirmed by the Revisional Court declining to permit the petitionerss to continue the prosecution by taking them on record being the legal representatives of deceased complainant Suresh Jain, cannot be sustained.

The criminal miscellaneous petition is, therefore, allowed. The impugned orders dated 4-4-2005 and 18-12-2003 passed by the Revisional Court and the trial Court respectively are set aside. The trial Court is directed to permit the petitioners, who are the legal heirs of deceased complainant Suresh Jain, to continue prosecution and proceed with the matter in accordance with law. The record of the trial Court be returned forthwith.

(H.R. PANWAR), J.

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